Zylyftari v Gleason
2019 NY Slip Op 34953(U)
December 23, 2019
Supreme Court, Kings County
Docket Number: Index No. 513248/2018
Judge: Debra Silber
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KINGS COUNTY CLERK
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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ALBERT ZYLYFTARI,

Plaintiff,

-against-

TODD GLEASON,

Defendant.

---x

DECISION / ORDER

Index No. 513248/2018
Motion Seq. No. 1
Date Submitted: 10/24/19
Cal No. 54

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed...................	10-16
Affirmation in Opposition and Exhibits Annexed.........................	18-21
Reply Affirmation...	23

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action arising out of a motor vehicle accident which took place on December 12, 2017. Plaintiff was stopped in heavy traffic on Broome Street, near West Broadway, when his vehicle was hit by a vehicle driven by defendant Todd Gleason. In his four Bills of Particulars, plaintiff alleges that as a result of the accident, he sustained, among other injuries, herniated discs at L4-L5 and L5-S1 with radiculopathy, and a fracture of the humeral head in his left shoulder. Plaintiff has received a number of epidural injections and a lumbar discectomy (L5-S1), as well as physical therapy, chiropractic care, and acupuncture treatments. Plaintiff claims that he sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d),

as well as under the "permanent consequential limitation" and "significant limitation" categories. At the time of the accident, plaintiff was approximately forty-seven years old.

Defendant contends that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d). Defendant submits the pleadings, plaintiff's EBT transcript and affirmed IME reports from an orthopedist and a radiologist. Dr. Satish Kashyap examined plaintiff on February 11, 2019 and found normal ranges of motion in plaintiff's cervical and lumbar spine and in his left shoulder, with otherwise negative test results. He diagnoses plaintiff with "cervical spine sprain/strain–resolved; status post lumbar spine surgery on 09/21/2018–resolved; and left shoulder sprain/strain–resolved." Dr. Kashyap concludes that plaintiff had no objective evidence of a disability and no permanency. He notes that plaintiff told him he had previously injured his left shoulder and had surgery, which is a pre-existing condition, with related "atrophy, deformity and weakness."

Defendant also provides an affirmed report from a radiologist, Dr. Marc J. Katzman, who reviewed the February 2, 2018 MRI of plaintiff's lumbar spine. He states that the films indicate mild chronic degenerative disc disease, without any evidence of a recent post-traumatic injury. Dr. Katz concludes that the degenerative changes he sees in plaintiff's lumbar spine are chronic, pre-existing, and unrelated to the subject accident.

With regard to the 90/180 day category of injury, defendant provides plaintiff's EBT transcript. Plaintiff testified at his EBT that before the accident, he worked 60 hours a week making art and selling it in Union Square and other public spaces. After the accident, he has been painting but has not been able to sell his art because of his

pain and symptoms. He started painting again three months after the accident (EBT page 60 lines 11-14). On September 20, 2018, nine months after the accident, he had surgery to his lower back, a discectomy (at L5-S1).

Plaintiff opposes the motion. Plaintiff argues that defendant fails to make a prima facie showing with respect to plaintiff's alleged shoulder fracture, nor has defendant established that plaintiff was not restricted from performing substantially all of his usual and customary activities for 90 out of 180 days following the accident. With regard to the 90/180 day category, plaintiff points out that defendant's doctor examined him more than a year after the accident. Further, plaintiff maintains that the affidavit of his treating chiropractor, Scott Leist, D.C., raises issues of fact which require a trial. Dr. Leist reports therein that, from the date of the accident through his most recent examination on June 25, 2019, plaintiff has had significant quantifiable limitations in his range of motion in his cervical and lumbar spine, with positive test results. He opines that the MRI findings are "post-traumatic in nature and were caused, precipitated, aggravated and/or exacerbated by the subject accident." Further, Dr. Leist opines that, based upon his examination of plaintiff, which included objective range of motion testing, and the affirmation of the plaintiff's radiologist regarding the plaintiff's abnormal MRI of the lumbar spine, together with the complaints of pain made by plaintiff, that the subject accident "caused, precipitated, aggravated and/or exacerbated plaintiff's injuries and caused pain and restrictions in the range of motion in plaintiff's cervical and lumbar spine, which are permanent."

Conclusions of Law

Defendant has failed to make a prima facie showing that plaintiff was not

prevented from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 of the 180 days following the accident (*see Fils-Aime v Colombo*, 152 AD3d 493, 494 [2d Dept 2017] ["defendants' submissions failed to eliminate triable issues of fact as to whether the plaintiff sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d)"]; *Sullivan v Illoge*, 50 AD3d 886 [2d Dept 2008] ["defendants' motion papers did not adequately address the plaintiff's claim . . . that [he] sustained a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident]). Thus, as defendant has failed to make a prima facie case with regard to all of plaintiff's injuries and all fo the applicable categories of injury, the motion must be denied. Moreover, while plaintiff acknowledges that he had a pre-existing left shoulder injury–defendant's complete failure to address plaintiff's allegation of a fracture in the humeral head of plaintiff's left shoulder also requires the conclusion that defendant has not made a prime facie showing of his entitlement to summary judgment.

As the defendant has failed to meet his burden of proof as to all claimed injuries and all applicable categories of injury, the motion must be denied, and it is unnecessary to consider the papers submitted by this plaintiff in opposition (see *Yampolskiy v Baron*, 150 AD3d 795 [2d Dept 2017]; *Valerio v Terrific Yellow Taxi Corp.*, 149 AD3d 1140 [2d Dept 2017]; *Koutsoumbis v Paciocco*, 149 AD3d 1055 [2d Dept 2017]; *Aharonoff-Arakanchi v Maselli*, 149 AD3d 890 [2d Dept 2017]; *Lara v Nelson*, 148 AD3d 1128 [2d

Dept 2017]; *Sanon v Johnson*, 148 AD3d 949 [2d Dept 2017]; *Weisberg v James*, 146 AD3d 920 [2d Dept 2017]; *Marte v Gregory*, 146 AD3d 874 [2d Dept 2017]; *Goeringer v Turrisi*, 146 AD3d 754 [2d Dept 2017]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dept 2011]).

In any event, had defendant made a prima facie case for dismissal, plaintiff's treating chiropractor's affidavit is sufficient to overcome the motion and raise an issue of fact as to whether plaintiff sustained a serious injury as a result of the accident (*see Young Chan Kim v Hook*, 142 AD3d 551, 552 [2d Dept 2016]).

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

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Dated: December 23, 2019

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court